In the Supreme Court of the United States.

DECEMBER TERM, 1867.

STEAMSHIP WREN AND CARGO.
vs.
UNITED STATES.
No. 101.

Appeal from United States district court for Southern District of Florida.

THE CASE.

This vessel was seized and captured upon the high seas on the 13th of June, 1865, by non-commissioned captors, and carried into the port of Key West; and on the 16th of June was libelled, with the cargo on board, as prize of war in the district court for the southern district of Florida.

On the 26th of June Edward C. Stiles, the master, filed a claim for the steamship on behalf, and as the alleged property, of John Laird, "a lawful British subject," averring that Laird, "and no other person is the owner thereof, as appears by the register of the said

steamer, now in the possession of the court, and as he is informed and believes." (Rec., p. 3.) The claim further stated that the steamer had no cargo on board when seized.

The circumstances of the seizure were stated by Stiles, in an affidavit accompanying the claim, thus:

"On the 12th of June, 1865, the said steamer left the port of Havana, bound to Liverpool, via Halifax; that while on the voyage to the said port, about 1½ o'clock, a. m., June 13th, a portion of the crew of the said steamer mutinied, and the claimant was put in irons by the mutineers, two of whom entered his room when he was asleep and overpowered him; that this claimant and the said steamer were then brought into the port of Key West, where she was delivere dover to the prize court by a Mr. Gilley, who at the same time took from the person of this claimant the ship's papers," etc. (Rec., p. 3.)

After a hearing upon the testimony *in preparatorio*, and the papers found on board the vessel, the court on August 15, 1865, condemned vessel and cargo as, at the time of capture, "the property of enemies of the United States." (Rec., p. 6.)

From this decree the claimant prayed, and was allowed, an appeal to this court. (Rec., p. 7)

The Facts.

1. It appears that in the month of June, 1865, while this Steamer was lying at Havana, a number of persons, loyal citizens of the United States, believing that she was owned by the Confederate Government, formed a plan and entered into an agreement for her subduction,

capture, and delivery into the possession of the United States authorities. These persons accordingly joined the ship's company, in various capacities, and left the port of Havana on board of her.

On the morning of the 13th of June, 1865, before daylight, they rose and took forcible possession of the steamer on the high seas, in latitude 26°, longitude 79° 40′, and navigated her into the port of Key West, where they anchored her under the guns of Fort Taylor. They secured the papers on board, and delivered them, with the steamer, her officer and crew, into the custody of the prize court.

The men who performed this important and patriotic service were Charles W. Gilley, P. Hamilton, J. Howard, R. Carson, Charles Davis, P. Murray, L. Vernell, P. Colly, C. Folley, and O. Folley. (Rec., p. 9.)

Their act of capture was ratified by the government of the United States, through the libel filed against the vessel by the law officers at Key West, as lawful prize of war.

2. The proofs show that the Wren was built at Birkenhead, England, in 1864, by Messrs. Laird Bros, and registered at Liverpool, on December 24, 1864, in the name of "John Laird, the younger, of Birkenhead, in the county of Chester, shipbuilder." (Rec., p. 24, 25.)

That she was constructed for the confederate rebels, and that this register was nothing but a cover of the rebel title, is plain on the face of this record. The Lairds made themselves famous, or rather infamous, during the rebellion, as the builders of the Alabama, and of iron-clad rams, for the service of the confederate government. Their character, in relation to the

rebel ship-building interests, is established by the judicial records of Great Britain and the diplomatic history of the late contest, (Diplomatic Corresp., part 1, pp. 222, 377; 381, 382;) and it is a fact of which this Court will take cognizance, and to which it will give due effect in a case of asserted ownership by that firm, or any of its members, of a vessel found in any way employed or navigated in the interest of their rebel patrons. And such was the predicament of this vessel.

The proofs here show that she was placed, it must have been immediately after she was launched, upon the blockade-running line between Havana and Galveston, carrying arms and munitions of war to the rebel armies in Texas, and returning with cotton in payment for them. (Rec., pp. 15–19.) And during all this period she carried the "confederate flag." (Rec., p. 21.) This last voyage to Galveston must have been made in April or May of 1865. On that voyage, as appears by the letter of Gen'l Magruder, on page 53 of the record, she carried Blakely guns shipped by the rebel agent, Helm, at Havana. This letter is addressed to the man, "*Comd'r Stiles, C. S. navy,*" who was in command of the Wren when she was seized. Stiles appears to have gone to Galveston on secret public business, in the steamer Owl, (Rec., p. 52,) and returned to Havana on board the Wren, bearing the message about the Whitworth guns contained in the Magruder letter referred to.

The Wren must have reached Havana, on this last voyage from Galveston, early in June, 1865. By that time the surrender of the rebel armies had occurred. The "confederacy" was in its death-throes.

The steamer was accordingly placed, soon afterwards, in the month of June, in command of an officer and agent of the rebel navy and government, to navigate her back to England, beyond the reach of the United States authorities. The officer selected for this purpose was one Edward C. Stiles, whose career, first as an officer of our navy, then as a United States consul at Vienna, and afterwards as an officer of the rebel army and navy, and secret confidential agent in Europe, at Havana, and in Richmond, of the rebel government, is displayed by the papers printed in this record.

The plan was, undoubtedly, so arranged by the rebel agents at Havana, that Stiles might be enabled, in the event of capture on the voyage, to swear that the steamer was the private property of the Lairds. It is said he was appointed to the command by a *Mr. Ramsay*. (Rec., p. 10.) All the other witnesses swear that "Major Helms," who, it is well known, was a military agent of the rebels at Havana, appointed Stiles to the command. (Rec., p. 21.)

If Ramsay had anything to do with this business, his name was, probably, employed by Helms as a means of simulating a private control over the vessel.

With the British flag at the fore, and a "confederate flag" in the cabin, the Wren, under Stile's command, set sail from Havana, bound to Halifax, to land some Southern "passengers," and thence to Liverpool. But, fortunately, the voyage was brought abruptly to a termination, by the gallant enterprise of a number of men whow knew her character, and the object of her flight from Havana. Through their efforts, as before related, she was brought to the present adjudication.

3. The career of Stiles, and his connexion with this vessel, deserve a separate paragraph in this brief. It is he alone who pretends that Laird, of Birkenhead, owned her. And who is he? The President of the United States, Mr. Van Buren, "reposing special trust and confidence," in his abilities, *patriotism*, valor and *fidelity*, appointed him, in 1840, a midshipman of the United States Navy. (Rec., p. 29.)

In 1856, President Pierce appointed him United States consul at Vienna, on the recommendation of President Buchanan, from whose letter it seems he was born in Pennsylvania, and was connected with one of the distinguished families of that State. (Rec., p. 32.)

In 1861, September 25, he obtained from the U. S. minister at Vienna, J. Glancey Jones, a passport, which requested "all whom it may concern to permit safely and freely to pass, and in case of need, to give all lawful aid and protection to Edward C. Stiles, a citizen of the United States," etc. (Rec., p. 33.) This pasport was *vised* at the consulate on April 18, 1862. (Rec., p. 34.) Under its protection, Stiles, in breach of his special official oaths of loyalty, and in violation of his duty as a citizen, went at once into the service of the rebel Government, and we find him in London, in November, 1862, negotiating for a gunboat for the rebel navy, (Rec., p. 34,) as an agent of the Confederates.

From London, he went to Bermuda in command of the "C. S. S. Justicia," fitted out by the house of S. Isaac, Campbell & Co., who figured in the venture of the SPRINGBOK. (5 Wallace, p. 3.) At Bermuda he bought the Steamship Cornubia, in his capacity as re-

bel agent. (Rec., p. 36.) The Cornubia was the property of Thomas Sterling Begbie, the gentleman who chartered the Springbok. (3 Wallace, 3.)

The sale of this vessel was made at London, when Stiles was there, but the delivery occurred at Bermuda. If she had been captured on the voyage, Begbie would have claimed her. (Rec., p. 37.) This transaction shows how vessels really owned by the rebels were covered by ostensible British titles.

Stiles probably went to Wilmington on the Cornubia. We find him at Richmond on December 24, 1862, and there he received the appointment as captain of artillery on ordnance duty. (Rec., p. 38.)

He returned to Bermuda in the Cornubia, with a cargo of cotton owned by the rebel government. (Rec., p. 39.) In February, 1863, he is in Paris and London for the purchasing of a vessel suitable for blockade running. (Rec., p. 40.) He finally buys the "Eugenie," from Mr. *Saul Isaac*, one of the firm of Isaac, Campbell & Co., (Rec., 42, and proceeds on her to America, bearing dispatches from A. Dudley Mann, to "*the President*," from Brussels. (Rec., p. 41.) At Richmond on May 21, 1863, he waits upon Jefferson Davis, and is appointed "lieutenant for the war in the Navy of the Confederate States." (Rec., p. 42.) He takes an oath of allegiance to the confederacy. (Rec., p. 43.) At Wilmington, N. C., he takes command of the "Eugenie," and returns to Bermuda, and there he loads the rebel ship "Harriet Pinckey," for Charleston. In September, 1863, he goes to Europe, by authority of Mallory, rebel secretary, for the purchase of vessels "for the volunteer navy of Virginia." (Rec., p. 45.) From London he corresponds with John Slidell, about the cot-

ton loan, and negotiates with that well-known personage, Thos. Sterling Begbie. (Rec., pp. 46, 47.) He finally buys the steamer Hawk, from Begbie, and sails for Havana. (Rec., pp. 50, 51, el. seq.)

By authority of C. J. Helm, rebel agent there, he goes to Galveston on the steamer Owl, in April, 1865, on secret public business, as commander in the C. S. Navy. There he meets the "Wren," in command of one Captain Moore, and returns to Havana on board of her. At Havana, he is appointed by Helm to take the Wren to Liverpool. Such is, in brief, the career of this man, a violator of every oath of allegiance he ever took; an avowed traitor not only to his country, but to his State, who had the effrontery to make a claim for this vessel; and he swears that he is "*a subject of Great Britain and owes allegiance to Queen Victoria!*" (Rec., p. 10.)

First Point.

It is sufficiently clear, without further elucidation, on the face of the foregoing statement of the facts of the case, that this steamer was the public property of rebel enemies at the time of the capture.

1. The circumstances of her construction, employment, and control, proves this beyond a doubt.

2. There is no oath, of proper form and precision, attesting any private proprietorship. Even this man, Stiles, does not affirm absolutely the ownership asserted on behalf of Laird. He swears he derives his knowledge from the *register*, and has no other source of belief on the subject. (See claim, Rec., p. 3, testimony, p. 11) That of course is not sufficient.

3. The other witnesses swear that Fraser, Trenholm, & Co. were the owners. (Rec., p. 18.) They also say, that Charles J. Helms, the Havana rebel agent, appointed Stiles to the mastership.

4. Another fact, most important in this connection and completely confirmatory of the view here taken, is, that Stiles, himself, admits that he destroyed, after the capture, a letter to himself from Mr. Helms, *the agent of the vessel*, and an order in his favor for forty pounds, payable to him on the delivery of the ship at Liverpool. (Rec., p. 12, int. 20.) Independently of the effect of this spoliation, as depriving the claimant of further proof, the statement concerning it shows affirmatively, that Helms controlled the vessel, and paid for her navigation to Liverpool. The conclusive presumption is, that he did so on behalf of his principals, the rebel authorities at Richmond, who must, therefore, have been the owners.

Second Point.

Independently of any question of ownership, the vessel is confiscable for the breach of blockade on the voyage next preceding that on which she was captured.

The proofs show conclusively, that the last voyage before the capture was, in May, 1864, from Galveston to Havana, with a cargo of cotton, received in return for the cannon carried on the outward voyage; and this breach of blockade subjected her to lawful capture on the present voyage, and affords a valid legal ground of condemnation.

The Christiansberg, 6 Rob., 376.

Third Point.

The capture was made *nondum cessante bello.*

Whether it was or was not does not matter, as the vessel was public property, and belongs to the United States, independently of title by capture, as part of the military assets of the extinct confederacy, and the proceeds must be conveyed into the treasury of the United States under the order of a decree of condemnation, tion, or otherwise, of the court having the custody of them.

But, in point of fact, the war was pending on June 13, 1865, though Mr. Stiles says he thought it was over.

It was not till the next year that the President, by his proclamation of April 2, 1866, announced that the insurrection which *theretofore* existed in the ten States enumerated, had terminated. The insurrectionary *status* of these States continued to exist up to the date of that proclamation. At the date of this capture the blockade of many of the southern ports was still enforced and maintained, as established in pursuance of the proclamations of 19th and 27th of April, 1861.

On the 23rd of June, 1865, the President proclaimed the blockade, thus established, to be rescinded, and declared that they would be open to foreign commerce on the 1st of July of that year. (13 Stats., 768.) And on the next day, the 24th of June, his further proclamation annulled, with certain exceptions, the restrictions theretofore existing upon internal, domestic, and coastwise trade with the States previously declared in insurrection. (Ibid, p. 76.)

It was not till August 29, 1865, that a further proclamation authorized trade in *contraband* articles under the regulations of the Treasury Department; nor was it till December 1, 1865, the the President revoked the suspension of the privilege of the writ of habeas corpus in the Northern States, leaving the suspension still in force in the Southern States, under President Lincoln's proclamation of March 3, 1863.

There can be no doubt, therefore, that if the capture was not made *flagrante*, it was made *nondum cessante, bello.*

Fourth Point.

The capture was valid, although effected by non-commissioned persons; the principle being that if the acts of such captors are adopted by the government, the property becomes, when condemned, a *droit* of the government, and the captors are entitled to an allowance out of the proceeds, within the sound discretion of the court, as salvage.

The Caledonian, 4 Wh., 100.
The Amiable Isabella, 6 ib., 1.
Carrington *vs.* Ins. Co., 8 Pet., 495.
The Dos Hermanos, 10 Wh., 413.

HENRY STANBERY,
Attorney General.
J. HUBLEY ASHTON,
Special Counsel for the United States.

1 UNITED STATES OF AMERICA, *Southern district of Ohio:*

At a circuit court of the United within and for the seventh judicial circuit and southern district, begun and held at the court-house in the city of Cincinnati, on the first Tuesday, being the third day of October, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States of America the ninetieth. Present, the Hon. N. H. Swayne and the Hon. Humphrey H. Leavitt.

Indictment for embezzlement.

THE UNITED STATES OF AMERICA
vs.
ISAAC N. COOKE. } 191.

The indictment was returned and filed in said court on the first day of November, A. D. 1864, indorsed "A true bill" by the foreman of the grand jury, in the word and figures following, to wit:

THE UNITED STATES OF AMERICA, *Southern district of Ohio:*

In the circuit court of the United States within and for the seventh circuit and southern district of Ohio, of the term of October, in the year eighteen hundered and sixty-four.

First count.—The grand jurors of the United States of America within and for the seventh circuit and southern district of Ohio, upon their oaths and affirmations, present that one Isaac N. Cooke, late of said district, on the first day of May, eighteen hundred and sixty-two, at Hamilton county, State of Ohio, to wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloniously, he, the said Isaac N. Cooke, then and there being an officer of the United States, to wit, an additional paymaster in the army of the United States, and then and there having the custody, safe-keeping, and disbursement of a large sum of money, to wit, the sum of one million dollars of the public money of the United States, which before that time had been, and was then and there intrusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the army of the United States, by the proper authority of the United States, and by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff, and making further provisions for the army of the United States," approved April 24, 1816; an act entitled "An act authorizing the appointment of additional paymasters and for other purposes," approved July 4, 1836; an act entitled "An act to increase the present military establishment of the United States and for other purposes," approved July 5, 1838; an act entitled "An act making alterations in the pay department of the army," approved June 17, 1846; an act entitled "An act concerning the pay department of the army," approved March 2, 1849, and of divers other acts and parts of acts of the said the Congress of the United States for the payment of and disbursement to divers, to wit, one thousand soldiers, then and there in the military service of the

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United States, with force of arms, unlawfully, knowingly, and
3 feloniously, did then and there convert to his own use and embezzle a portion of the said public money of the United States so to him, the said Isaac N. Cooke, then and there intrusted in his official capacity as an additional paymaster in the army of the United States, for safe-keeping, transfer, and disbursement, to wit, the sum of fifty thousand dollars, portion of the said public money of the United States, the same being then and there the property of the United States, with intent to defraud the United States of America, contrary to the form of the act of the Congress of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

Second count.—And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Isaac N. Cooke, late of said district, on the sixth day of July, eighteen hundred and sixty-two, at Hamilton county in the State of Ohio, wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloniously, he, the said Isaac N. Cooke, then and there being an officer of the United States, to wit, an additional paymaster in the army of the United States, and then and there having the custody, safe-keeping, and disbursement of another large sum of money, to wit, the sum of one million dollars of the public money of the United States, which before that time had been and was then and there intrusted to him, the said Isaac
4 N. Cooke, in his official capacity as an additional paymaster in the army of the United States, by the proper authority of the United States, and by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff, and making further provisions for the army of the United States," approved April 24, 1816; an act entitled "An act authorizing the appointment of additional paymasters and for other purposes," approved July 4th, 1836; an act entitled "An act to increase the present military establishment of the United States, and for other purposes," approved July 5th, 1838; an act entitled "An act making alterations in the pay department of the army," approved June 17th, 1846; an act entitled "An act concerning the pay department of the army," approved March 2d, 1849, and of divers other acts and parts of acts of the said the Congress of the United States, for the payment of and disbursement to divers. to wit, one thousand soldiers, then and there in the military service of the United States, with force and arms, unlawfully, knowingly, and feloniously, did then and there convert to his own use and embezzle a portion of the said public money of the United States so to him, the said Isaac N. Cooke, then and there intrusted in his official capacity aforesaid, as an additional paymaster in the army of the United States, for safe-keeping, transfer, and disbursement, to wit, the sum of fifteen thousand dollars, portion of the said last-named public money of the United States,
5 the same being then and there the property of the United States, with intent to defraud the United States, contrary to the form of the statute of the United States of America in such case

made and provided, and against the peace and dignity of the United States of America.

Third count.—And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Isaac N. Cooke, late of said district, on the fifteenth day of October, eighteen hundred and sixty-two, at Hamilton county in the State of Ohio, to wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloniously, he, the said Isaac N. Cooke, then and there being an officer of the United States, to wit, an additional paymaster in the army of the United States, and then and there as such officer having the custody, safe-keeping, and disbursement of another large sum of money, to wit, the sum of one million dollars of the public money of the United States, which before that time had been, and was then and there intrusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the army of the United States, by the proper authority of the United States, and by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff, and making further provisions for the army of the United States," approved April 24, 1816; an act entitled "An act authorizing the appointment of additional paymasters, and for other
6 purposes," approved July 4, 1836; an act entitled "An act to increase the present military establishment of the United States, and for other purposes," approved July 5, 1838; an act entitled "An act making alterations in the pay department of the army," approved June 17, 1846; an act entitled "An act concerning the pay department of the army," approved March 2, 1849; and of divers other acts and parts of acts of the said the Congress of the United States, for the payment of and disbursement to divers, to wit, one thousand soldiers, then and there in the military service of the United States, with force and arms, unlawfully, knowingly, and feloniously, did then and there convert to his own use and embezzle a portion of the said last-named public money of the United States so to him, the said Isaac N. Cooke, then and there intrusted to him in his official capacity aforesaid, as an additional paymaster in the army of the United States, for safe-keeping, transfer, and disbursement, to wit, the sum of forty thousand dollars, portion of said last-named public money of the United States, and which last-named sum of public money he, the said Isaac N. Cooke, an additional paymaster as aforesaid, was then and there not authorized to retain as salary, pay, or emolument, the same being then and there the property of the United States, with intent to defraud the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

7 *Fourth count.*—And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Isaac N. Cooke, late of said district, on the twelfth day of September, eighteen hundred and sixty-two, at Hamilton county, in the State of Ohio, to wit, at the district aforesaid, and within the jurisdiction of

this court, with force and arms, unlawfully, knowingly, and feloniously, he, the said Isaac N. Cooke, then and there being an officer of the United States, to wit, an additional paymaster in the army of the United States, and then and there as such officer having the custody, safe-keeping, and disbursement of another large sum of money, to wit, the sum of twenty thousand dollars of the public money of the United States, which before that time had been, and was then and there intrusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the army of the United States, by the proper authorities of the United States, and by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff and making further provisions for the army of the United States," approved April 24th, 1816; an act entitled "An act authorizing the appointment of additional paymasters and for other purposes," approved July 4th, 1836; an act entitled "An act to increase the present military establishment of the United States and for other purposes," approved July 5, 1838; an act entitled "An act making alterations in the pay department of the army," approved June 17th, 1846; an act entitled "An act concerning the pay department of the army," approved March 2, 1849, and of divers
8 other acts and parts of acts of the said Congress of the United States for the payment and disbursement to divers, to wit, one thousand soldiers, then and there in the military service of the United States, with force and arms, unlawfully, knowingly, and feloniously did then and there convert to his own use and embezle a portion of the said last-named public money of the United States so to him, the said Isaac N. Cooke, then and there intrusted to him in his official capacity aforesaid, as an additional paymaster in the army of the United States, for safe-keeping, transfer, and disbursement, to wit, the sum of twenty thousand dollars, portion of said last-named public money of the United States, and which said last-named sum of public money he, the said Isaac N. Cooke, an additional paymaster as aforesaid, was then and there not authorized to retain as salary, pay, or emolument, the same being then and there the property of the United States, with intent to defraud the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

Fifth count.—And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Isaac N. Cooke, late of said district, on the twentieth day of September, eighteen hundred and sixty-two, at Hamilton county in the State of Ohio, to
9 wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloniously, he, the said Isaac N. Cooke, then and there being an officer of the United States, to wit, an additional paymaster in the army of the United States, and then and there as such officer having the custody, safe-keeping, and disbursement of another large sum of money, to wit, the sum of one million dollars of the public money of the United States, which before that time had been, and was then and there in-

trusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the army of the United States, by the proper authority of the United States, and by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff, and making further provisions for the army of the United States," approved April 24th, 1816; an act entitled "An act authorizing the appointment of additional paymasters and for other purposes," approved July 4th, 1836; an act entitled "An act to increase the present military establishment of the United States and for other purposes," approved July 5th, 1838; an act entitled "An act making alterations in the pay department of the army," approved June 17th, 1846; an act entitled "An act concerning the pay department of the army," approved March 2d, 1849, and of divers other acts and parts of acts of the said Congress of the United States for the payment and disbursement to divers, to wit, one thousand soldiers then
10 and there in the military service of the United States, with force and arms, unlawfully, knowingly, and feloniously, did then and there convert to his own use and embezzle a portion of the said last-named public money of the United States, so to him, the said Isaac N. Cooke, then and there intrusted to him in his official capacity aforesaid, as an additional paymaster in the army of the United States, for safe-keeping, transfer, and disbursement, to wit, the sum of fifteen thousand dollars, portion of said last-named public money of the United States, and which said last-named sum of public money he, the said Isaac N. Cooke, an additional paymaster as aforesaid, was then and there not authorized to retain as salary, pay, or emolument, the same being then and there the property of the United States, with intent to defraud the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

Sixth count.—And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Isaac N. Cooke, late of said district, on the fifteenth day of November, eighteen hundred and sixty-two, at Hamilton county in the State of Ohio, to wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloniously, he, the
11 said Isaac N. Cooke, then and there being an officer of the United States, to wit, an additional paymaster in the army of the United States, and then and there as such officer having the custody, safe-keeping, and disbursement of another large sum of money, to wit, the sum of one million dollars of the public money of the United States, which before that time had been, and was then and there intrusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the army of the United States, by the proper authority of the United States, and by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff, and making further provisions for the army of the United States," approved April 24th, 1816; an act entitled "An act authorizing the appointment of additional paymasters and

for other purposes," approved July 4th, 1836; an act entitled "An act to increase the present military establishment of the United States and for other purposes," approved July 5th, 1838; an act entitled "An act making alterations in the pay department of the army," approved June 17th, 1846; an act entitled "An act concerning the pay department of the army," approved March 2d, 1849, and of divers other acts and parts of acts of the said Congress of the United States, for the payment and disbursement to divers, to wit:

12 one thousand soldiers, then and there in the military service of the United States, with force and arms, unlawfully, knowingly, and feloniously, did then and there convert to his own use and embezzle a portion of the said last-named public money of the United States so to him, the said Isaac N. Cooke, then and there intrusted to him in his official capacity aforesaid, as an additional paymaster in the army of the United States, for safe-keeping, transfer, and disbursement, to wit, the sum of fifty thousand dollars, portion of said last-named public money of the United States, and which said last-named sum of public money he, the said Isaac N. Cooke, an additional paymaster as aforesaid, was then and there not authorized to retain as salary, pay, or emolument, the same being then and there the property of the United States, with intent to defraud the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

FLAMEN BALL, *Att'y U. States.*

To said indictment the defendant, by special leave of the court, at the October term, A. D. 1865, filed his demurrer in the words and figures following, to wit:

Indictment for embezzlement.

THE UNITED STATES OF AMERICA
vs.
ISAAC N. COOKE.

And the said Isaac N. Cooke, by special leave of the court, in his own proper person, comes into court here, and having heard the said indictment read, saith that the said indictment, each count thereof

13 severally, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said Isaac N. Cooke, is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore, and for want of a sufficient indictment in this behalf, the said Isaac N. Cooke prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

ISAAC N. COOKE,
By KEBLER & WHITMAN and
HUNTER & DOUGHERTY, *Attorneys.*

And the United States of America, by the district attorney of said district, thereupon filed a joinder in demurrer, in the words and figures following, to wit:

THE UNITED STATES OF AMERICA
against
ISAAC N. COOKE.
} Indictment for embezzlement.

And the said The United States of America, by Richard M. Corwine, United States district attorney for said district, comes and says that the matters and things as in said indictment set forth and pleaded, are sufficient in law for said plaintiff to have and demand the prosecution and conviction of said defendant. Wherefore, and by reason of anything in the demurrer of the defendant herein filed, the plaintiff prays judgment, &c.

R. M. CORWINE, *U. S. Dis. Att'y.*

And now at this term of said court, the case coming on to be heard, and being argued upon the said indictment, demurrer, and joinder in demurrer, the following questions occurred before the court, upon which and upon each of which, the opinions of the judges
14 were opposed, namely:

1st. Whether the defendant being, as charged in the several counts of the indictment, at the several times therein stated an additional paymaster in the army of the United States, and not otherwise an officer of the United States, was in his said capacity of additional paymaster or otherwise, by the act of the Congress of the United States entitled "An act to provide for the better organization of the treasury, and for the collection, safe-keeping, transfer, and disbursement of the public revenue," approved August 6, 1846, or by all or any of the several other acts of Congress specified in each or either of the counts of said indictment, or by any other act of Congress not so specified, charged with the safe-keeping, transfer, and disbursement of the public moneys, within the meaning of the sixteenth section of the said act, approved August 6th, 1846, above named, and amenable to the penalties thereof by reason of the facts alleged in the indictment, or any count thereof.

2d. Whether the said indictment, and each of the counts thereof, severally, are not insufficient in law, for want of certainty in the averments thereof, in this: that in addition to the allegations, that certain specified and enumerated acts of Congress set forth in the several counts by their title and date of approval, by virtue of which it is alleged in said counts, severally, that the defendant had been and was intrusted with the safe-keeping and disbursement of the public
15 money in said counts mentioned, it is alleged and averred that the defendant was so intrusted with said money by virtue of divers other acts and parts of acts of the Congress of the United States, without any other or further specification thereof.

3d. Whether the defendant is amenable to be indicted and punished under the provisions of the sixteenth section of the act approved August 6, 1846, aforesaid, upon which said indictment is founded, by reason of the acts of embezzlement charged against him in said indictment, or any of the counts thereof, touching the public

money whereof he had the safe-keeping and disbursement, solely and exclusively by virtue of acts of Congress enacted subsequently to the date of the approval of the said act of August 6th, 1846.

4th. Whether the several counts of said indictment are not insufficient in law in this, to wit: that in the material allegations of each of said counts the initial letters "U. S." only are used and substituted for certain words, without which words expressed or implied the said allegations would be unintelligible and without legal effect; and particularly whether the first count of said indictment is not insufficient in law, because in stating the official capacity of the defendant, he is described as "an additional paymaster in the army of the U. S.," and

16 because it is averred in said count that as such the defendant had the custody, safe-keeping, and disbursement of a large sum of money, to wit, one million dollars of the public money of the U. S.; that he did then and there convert to his own use and embezzle a large portion of the said public money of the U. S., &c., to wit, the sum of $50,000. portion of the said public money of the U. S., the same being then and there the property of the U. S., with intent to defraud the U. S. of America. And whether each of the remaining counts are not, for the like reason, insufficient in law, and whether the said letters "U. S," as used in said indictment as above specified, have in law a known and determinate meaning, such as warrants them to be used in criminal pleading, as in this indictment, in place of words.

And thereupon at and within the same term of this court, upon the request of the said defendant, by his counsel, the judges being so, as aforesaid, opposed in opinion, have caused the points upon which the disagreement happened, to be stated, as aforesaid, under their direction. And it is by said judges ordered that the foregoing statement of the case, and points of disagreement, be certified by the clerk under the seal of this court, to the Supreme Court of the United States, at their present session, to be held after this date.

N. H. SWAYNE.
H. H. LEAVITT.

17 UNITED STATES OF AMERICA, *Southern district of Ohio, ss:*

I, John McLean, clerk of the circuit court of the United States within and for said district, do hereby certify the foregoing to be a true and correct transcript of the above stated case, taken and copied from the journal and records of said court, as the same are kept in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 20th day of Dec., A. D. 1865, and in the 90th of American independence.

Attest:
[SEAL.]

JOHN McLEAN,
Clerk U. S. Cir. C't, S'th'rn Dist., Ohio.

Filed February 10, 1866.

*

1 Ch. Crim Law 281-2 Boston

SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA

vs.

ISAAC N. COOKE.

ON DEMURRER TO INDICTMENT.

ARGUMENT FOR DEFENDANT.

By KEBLER & WHITMAN, and
H. H. HUNTER,
Att'ys for Def't.

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES OF AMERICA
vs.
ISAAC N. COOK.

Indictment for embezzlement founded on Sec. 16 of the Sub-Treasury Act of Aug. 6, 1846.

[On certificate of division of opinion of the Judges of the Circuit Court of the United States for the Seventh Circuit and Southern District of Ohio.]

ABSTRACT OF CERTIFICATE.

THE INDICTMENT — *First Count.* — That one Isaac N Cook, on the first day of May, 1862, at, etc., with force and arms unlawfully, knowingly and feloniously, he, the said Isaac N. Cook, then and there being an officer of the United States, to-wit: *an additional paymaster* in the army of the United States, and then and there having the custody, safe keeping and disbursement of a large sum of money, to-wit: the sum of one million dollars of the public money of the United States, which before that time had been and was then and there intrusted to him, the said Isaac N. Cook, in his official capacity as an additional paymaster, in the army of the United States, by the proper authority of the United States, and by virtue of divers acts of the Congress of the United States, to-wit: *An act for organizing the general staff, and making further provisions for the army of the United States,*" approved April 24, 1816; an act entitled "*An act authorizing the appointment of additional paymasters, and for other purposes,*" approved July

4, 1836; an act entitled "*An act to increase the present military establishment of the United States, and for other purposes,*" approved July 5, 1838; an act entitled "*An act making alterations in the pay department of the army,*" approved June 17, 1846; an act entitled "An act concerning the pay department of the army," approved March 2, 1849, *and divers other acts and parts of acts of the Congress of the United States,* for the payment of divers, to-wit: one thousand soldiers then and there in the military service of the United States, with force and arms unlawfully, knowingly and feloniously did, then and there, convert to his own use and embezzle a portion of the said public money of the United States, so to him, the said Isaac N. Cook, then and there intrusted, in his said official capacity as *additional paymaster* in the army of the United States, for safe keeping, transfer and disbursement, to-wit: the sum of fifty thousand dollars, portion of the said public money of the United States, the same being then and there the property of the United States, with intent to defraud the United States of America, contrary to the form of the act of Congress, etc., etc.

Second count—Is like the first, except the date of the embezzlement is laid on July 6, 1862, and the amount embezzled at $15,000.

Third count—The same; stating the date to have been October 15, 1862—the amount $40,000—and negativing the authority of the defendant to retain the same for pay or emolument.

Fourth count—The same—with date Sept. 12, 1862—amount $20,000; without negativing authority to retain, etc.

Fifth count—The same; with same date, and amount $15,000; negativing authority to retain, etc.

Sixth count—The same; date Nov. 15, 1862; amount $50,000; negativing authority to retain, etc.

At October term, 1865, the defendant put in a general demurrer to the indictment, and the District Attorney filed a joinder.

At the same term the case came on to be heard on the demurrer and joinder, and upon such hearing the judges were opposed in opinion on the following questions:

1st. Whether the defendant, being as charged in the several counts of the indictment, at the several times therein stated, an additional paymaster in the army of the United States, and not otherwise an officer of the United States, was, in his said capacity of additional paymaster, or otherwise, by the act of Congress of the United States, entitled "*An act to provide for the better organization of the treasury*, and for the collection, *safe keeping, transfer and disbursement* of the *public revenue*," approved August 6, 1846, or, *by all*, or *any* of the several *other* acts of Congress, specified in each or either of the counts of said indictment, or by *any other* act of Congress, not so specified, *charged with the safe keeping, transfer and disbursement of the public moneys*, within the meaning of the sixteenth section of said act, approved August 6, 1846, above named, and amenable to the penalties thereof by reason of the facts alleged in the indictment, or any count thereof.

2d. Whether said indictment and each of the counts thereof, severally, are not insufficient in law, for want of certainty in the averments thereof, in this: that, in addition to the allegations that certain specified and enumera-

ted acts of Congress, set forth in the several counts, by their title, and date of approval, by virtue of which it is alleged in said counts severally, that the defendant had been and was intrusted with the safe keeping and disbursement of the public money in said counts mentioned, it is alleged and averred that the defendant was so intrusted with said money, by virtue of divers other acts and parts of acts of the Congress of the United States, without any other or further specification thereof.

3d. Whether the defendant is amenable to be indicted and punished under the provisions of said act, approved August 6, 1846, aforesaid, upon which said indictment is founded, by reason of the acts of embezzlement charged against him in said indictment, or any of the counts thereof, touching the public money whereof he had the safe keeping and disbursement, solely and exclusively by virtue of acts of Congress enacted subsequently to the date of said act of August 6, 1846.

[NOTE.—A fourth question is stated in the certificate, but it was predicated upon a mistake of fact arising from an imperfect copy of the indictment used by counsel—the copy of the indictment certified is free from the imperfections supposed by the additional question, which is therefore waived.]

So far as material for present purposes, the provisions of Sec. 16 of the act of August 6, 1846, are as follows: "All officers and other persons *charged by this act, or any other act,* with the safe keeping, transfer and disbursement of the public money are required to keep an accurate entry of each sum received, and of each payment or transfer; and if any one of the said officers shall convert to his own use,

in any way whatever, or shall use by way of investment in any kind of property or merchandise, or shall loan, with or without interest, or shall deposit in any bank, or shall exchange for other funds except as allowed by this act, any portion of the public moneys intrusted to him for, etc., every such act shall be deemed and adjudged to be an embezzlement," etc.; "and any officer or agent of the United States, and all persons *advising or participating* in such act, being convicted thereof, before," etc., "shall be sentenced to imprisonment for a term of," etc., "and to a fine equal to the amount embezzled."

1816

So far as material for present purposes, the provisions of the *five* acts of Congress referred to in the indictment by their title and dates of approval, are severally as follows:

I. The act of April 24, 1816:

SEC. 3. The pay department shall consist of one paymaster general of the army, with the annual salary of two thousand five hundred dollars, and in addition to *regimental* paymasters, there be appointed one paymaster to each battalion of the corps of artillery, who, as well as the regimental paymasters, in addition to the regular and punctual payment of their respective regiments or corps, shall discharge the duties of district paymasters within such district as shall, from time to time, be assigned them by the paymaster general, under the directions of the Secretary of War.

II. The act of July 4, 1836:

SEC. 1. That the President of the United States be, and he is hereby authorized and empowered to appoint three *additional paymasters*, to be attached to the pay department of the army: *Provided*, that the appointment be

submitted to the Senate for their confirmation in the same manner as other officers of the army.

SEC. 2. That the officers appointed in virtue of this act shall perform the same duties, and receive the same pay and allowance, as the present paymasters of the army, and shall, in like manner, be subject to the rules and articles of war; and previous to entering upon the duties of their office, shall give such bonds to the United States as the Secretary of War may direct for the faithful performance of their duties.

SEC. 3. That when volunteers or militia are called into the service of the United States, so that the paymasters authorized by law shall not be deemed sufficient to enable them to pay the troops with proper punctuality, it shall be lawful for the President to assign to any officer of the army the duty of paymaster, who, while so assigned, shall perform the same duty, give the same bond, be subject to the same liability, and receive the same emoluments as are now provided for paymasters of the army: *Provided however*, that the number of officers so assigned shall not exceed one for every two regiments of militia or volunteers; *and provided, also*, that the whole emoluments of said officers, including their pay and allowances in the line, shall not exceed the pay and emoluments of a paymaster.

III. The act of July 5, 1838:

[NOTE.—We find nothing in this act which can, as we suppose, have any material bearing upon the questions under consideration.]

§ 25. When volunteers or militia called into service Pres may appoint additional paymasters as he shall deem necessary who shall perform duty, give bond, as paymasters of the army

IV. The act of June 17, 1846:

SEC. 1. Authorizes the President, by and with the advice and consent of the Senate, to appoint three additional paymasters.

SEC. 2. Provides that the officers appointed in virtue of the act shall perform the same duties, receive the same pay and allowances "as the present paymasters of the army," and be subject to the rules and articles of war, and shall give bond to the United States, as the Secretary of War may direct, for the faithful performance of their duties.

V. The act of March 2, 1849:

SEC. 1. That the pay department of the army shall consist of a paymaster general, who shall have the rank of colonel, and the same pay and allowances as are at present provided by law, and the same tenure of office as the heads of other disbursing departments of the army; two deputy paymasters general, with the same rank, pay and allowances as are now provided by law for such officers, and the same tenure of office as officers of like grade in other disbursing departments of the army; and twenty-five paymasters, with the same rank, pay, and allowances as are now provided by law for such officers, and the same tenure of office as officers of like grade in other disbursing departments of the army. That it shall be the duty of all disbursing officers of the pay department to renew their bonds, or furnish additional security, at least once in four years, or as much oftener as the President may direct. That the officers of the pay department provided for by the first section of this act, shall consist of the paymaster general, two deputy paymasters general now in commission, the fifteen paymasters who were in service under the acts

in force at the commencement of the war with Mexico, and ten paymasters to be selected from the *additional* paymasters now in service, and the thirteen paymasters authorized by the acts of the 17th of June, 1846, and the 3d of March, 1847.

[NOTE.—The act of March 3d, 1847, is not referred to in the indictment, as are the other acts above quoted from.

SEC. 12. Authorizes the President, with the advice and consent of the Senate, to add to the pay department *two* deputy paymasters general, and *ten* paymasters, who shall give bond, etc.

SEC. 13. Provides in relation to the rank of the officers of the pay department; and

SEC. 14. Requires all paymasters to be nominated by the President to the Senate for confirmation.]

POINTS AND COMMENTS.

Question First.—We have, so far as we are advised, abstracted the material provisions of all acts of Congress in force at the time of the alleged embezzlements, "*by which*," in the language of the section on which the indictment is founded, it can be claimed that the defendant was "*charged with the safe keeping, transfer and disbursement of the public money, by acts of Congress.*"

The first thing requiring attention is to determine what classes of persons are amenable to the penalties of said section. "All officers and other persons, *charged by this act, or any other act*, with the safe keeping, etc., of the public money," these, and none other, are so amenable.

What are we to understand by an officer being charged by *an act of Congress* with the safe keeping, etc., of the public money?

Is it enough, that an act of Congress shall create an office by name, as, for instance, the office of marshal, district attorney, paymaster, assistant paymaster, additional paymaster, and the like, without some provision in some law, prescribing it to be a duty of the officer to safely keep, or to receive or disburse the public money? Does the mere name, "*additional paymaster*," *charge* the incumbent with such duties?

If but a single enactment existed relating to additional paymaster, and that consisted in authorizing the President, with the advice and consent of the Senate, to appoint a specified number of additional paymasters, without anything further in the way of specifying duties, and the designated number were accordingly appointed, could it be said in a legal sense that the incumbents would be "charged *by act of Congress*" with the safely keeping and disbursing the public money? This would hardly be claimed; and if not, the state of case required to sustain an indictment under this section for embezzlement, would not exist. The mere fact that public money was placed in the hands of the incumbent to be disbursed, and that in violation of the trust he converted it to his own use, would not make a case under the law, simply because no act of Congress charged him with the duty.

All this is quite too obvious to require further comment. But it will be said that this is not such a case; that in fact, the acts of Congress referred to in the indictment specifically by their title and date of approval, do charge additional paymasters with the duty to safely keep and disburse public money; because it will be said, especially in reference to the acts of July 4, 1836, and June 17, 1846, each of which provides for additional paymasters, that they each provide "that such appointees shall perform the same duties," etc., "as the present paymasters of the army,"

and this, we concede, is so. But does that, without anything further, make out a case? We reply with confidence in the negative, for the obvious reason that none of the acts of Congress referred to specifically in the indictment, or, indeed, any act not so referred to, charge *paymasters* with such duties. The omission is complete as to both.

Will it be claimed that it is a necessary *implication* that the duty of a paymaster of the army is to receive, safely keep, and to disburse public money, and that this satisfies the language of the act in question? In reply to this, we would ask, Is there not a well marked difference between an implied or practical official duty, and a duty charged specifically, by act of Congress?—a *constructive* and an *express* duty? The case is upon a criminal law, in the construction of which the rule is strict. The pleader who framed the indictment felt this, when he pleaded the acts of Congress specifically; and manifiestly it would not have been sufficient to have averred that the defendant, being assistant paymaster, was charged as such with the safe keeping, etc, of the public funds, and converted the same to his own use, etc. The averment accordingly is, that he was charged by certain specific *acts of Congress* with the safe keeping, etc. This being so, it would be very illogical to hold that it is sufficient to plead a statute authorizing the *appointment* to the office, but silent as to the *duties*. Indeed, it seems to us that good pleading, according to well understood rules in such a case, requires that, instead of a mere reference to the acts relied upon, by their title and date of approval, the substance of their provisions relied upon, should be set out, so far as necessary to enable the Court to judge whether they, in fact, charge the required duty upon the accused. But this is not now a question to be considered as affecting the validity of the indictment.

This being so, it becomes necessary for the Court to look

beyond the indictment, to the acts of Congress themselves, and in that way determine whether they charge additional paymasters with the safe keeping and disbursement of the public money.

Having indicated the ground on which we rest the question upon the first point certified, and having given abstracts of all enactments necessary to be examined, we submit the matter without further comment, referring to the following authorities:

1 Sedgwick on Stat. & Cons. Law, 115, 116; *People* v. *Allen*, 5 Denio, 67; 1 Chit. C. Law, 281, *et seq.*; Archbold's Cr. Pl. 50, 1, 275; 3 Maul. & Selw. 539; *Shaw* v. *Tobias*, 3 Comst. 188.

Question Second.—The indictment avers that the defendant, being an assistant paymaster, was charged by *five* several acts of Congress, designated by their titles and dates of approval, and by *divers other acts and parts of acts of Congress*, with the disbursement, etc, of a large sum, to-wit: one million dollars of money, placed in his hands for that purpose, etc.

The question now presented is, whether the averment of "*divers other acts*," etc., is sufficiently certain; or whether the indictment is not defective in *certainty* in not specifying the said *other* acts?

We recognize the general rule, that it is sufficient in an indictment to allege the acts of the defendant which are made criminal by statute, without any recital of the provisions of the statute defining and declaring the criminality of the acts, the conclusion being "contrary to the form of the statute," etc. This rule is founded on the principle that the Court will take judicial notice of the statute and judge of the sufficiency of the facts averred, to constitute an offense against its provisions.

It will be seen, however, that the question now presented is wholly different from, and does not fall within, that rule or principle. The act of Congress upon which this indictment is founded, limits its penal provisions to officers and persons specifically designated, namely: such as are by the provisions of *that act, or any other act,* charged with the safe keeping, etc., of the public money. It is, so to speak, a statutory qualification—a limitation, which, in pleading, is necessary to be averred, in order to bring the party accused within the penalty of the enactment; and in this regard is a mere *fact,* and of which the Court can not judicially take notice, any more than of any other fact.

It is not that any officer or person having the possession of public money, who shall appropriate it to his own use, shall be deemed guilty of embezzlement, etc., but any officer or person "*charged by this act, or any other act,* with the safe keeping," etc. Hence it is necessary to aver that the accused was *so* charged—that is by some *act* or *acts*—and it must so appear from the terms of the act or acts averred: and if it do not so appear the indictment is clearly defective. For instance, if it were averred that the accused was charged by the judiciary act of 1789, with the safe keeping, etc., of the public money, etc., the indictment would be vicious, because the judiciary act can not be so construed; and some act that can be so construed must be averred. But, if no act in particular be averred, but "*divers acts,*" without specification, it is as if no averment were made; or the averment would be void for uncertainty. It would put the defendant and the Court to an investigation of the whole body of statute law bearing on the subject.

But will it be said that as this indictment does aver *five* statutes specifically, in connection with "*div ers other acts and parts of acts,*" it is sufficient because the clause, "divers

other acts," etc., may be stricken out as surplussage. We reply to this, that the whole is but one averment, and that the rule invoked does not admit of striking out a part of an averment. But further, for the reasons assigned in discussing the first question, none of the five acts referred to, or all of them together, charge assistant paymasters with the safe keeping, etc., of the public money—and therefore it is no more than if it had been averred that he was so charged by the act and "*divers other acts.*"

Third Question.—The act upon which the indictment is founded was approved August 6, 1846. One of the acts specifically averred, or referred to in the indictment was approved March 2, 1849. If by the latter act the defendant, being an additional paymaster, were charged with the safe keeping, etc., of the public money, and not by any other act in force at the date of the act on which the indictment is founded, would he be amenable to the penalties of the latter act? Can a criminal statute operate through the provisions of a *subsequent* statute, as would be necessary in this case, if the defendant were charged by the act of March 2, 1846, but by no *previous* act, with the safe keeping, etc., of the public money; and this without any provision of the subsequent act that persons so charged by it should be amenable to the penalties of the previous act? With such a provision, the effect would be a virtual re-enactment, or legislative extending, of the criminal act to the newly created class of persons or offenses. But, we submit that it would be a new principle of construction, so to extend, to newly created classes of cases, the provisions of a criminal statute, without express legislative enactment authorizing it. But the materiality of this question in this case, is, perhaps, removed by adverting to the provisions of the act of March 2, 1846. If we have not misappre-

hended that act, it does not contain any provision whatever relating to additional paymasters, except to provide that certain *paymasters* should be selected from certain *additional* paymasters.

Yet if the averment of "*divers other acts and parts of acts*" be not holden to be vicious, or at least nugatory, it is possible that *other subsequent* acts may be brought to view rendering it material to respond definitively to this *third* question; in which case we ask attention to the views upon it which are expressed above.